No. 9444

In the United States
Circuit Court of Appeals
For the Ninth Circuit

C. H. LEONARD,

Appellant,

vs.

SAMUEL H. BENNETT,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

JOHN W. McCULLOCH,
515 Pacific Building,
Portland, Oregon, and
HUGH L. BIGGS,
723 Pittock Block,
Portland, Oregon,
Attorneys for Appellant.

S. J. BISCHOFF,
Public Service Building,
Portland, Oregon, and
PAT H. DONEGAN,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND 0517

AUTHORITIES CITED

No. 9444

In the United States
Circuit Court of Appeals
For the Ninth Circuit

C. H. LEONARD,

Appellant,

vs.

SAMUEL H. BENNETT,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

The appellee in his answering brief contends that the debtor's petition filed December 22, 1938, stated jurisdictional facts. We now examine the petition to determine whether it states sufficient facts to give the court jurisdiction.

The petition of December 22, 1938, is a debtor's petition for composition and extension. The petition says it is filed "under Section 75, Act of March 3, 1933."

After the enactment by Congress of Section 75 of the Act of March 3, 1933, the Supreme Court of the United States prescribed and adopted Form No. 65, to be used by a debtor in proceedings under the Act of March 3, 1933. This form was adopted April 17, 1933. Form No. 65 as adopted at that time is the form used by the debtor in his first petition filed herein December 22, 1938.

After the decision of the Supreme Court in the case of *Louisville Bank vs. Radford,* 295 U.S. 599, the Congress by its amendment of 1935, 11 U.S.C.A., Section 203, Subdivision (r), changed the Bankruptcy Act as relating to a farmer-debtor. Thereafter, on June 1, 1936, the Supreme Court in its General Orders in Bankruptcy changed Form No. 65 as adopted April, 1933, to Form No. 65 as adopted June 1, 1936. This new Form No. 65 requires the petitioner to state in his petition as follows:

> "That he is primarily bona fide personally engaged in producing products of the soil, or that he is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from one or more of the foregoing operations." 298 U.S. 702.

Form No. 65 as adopted April, 1933, and in effect until June 1, 1936, is as follows:

> "Petitioner respectfully represents that he is personally bona fide engaged primarily in farming operations (or that the principal part

of his income is derived from farming operations as follows * * *".

The petition filed by the debtor on December 22, 1938, did not adopt or follow Form No. 65 then in effect, but did adopt and follow the old Form No. 65 which at that time was not in effect.

The question now under consideration is—Does the petition of December 22, 1938, state sufficient facts to give the court jurisdiction to proceed under the amendment of 1935.

At the time the debtor's petition was filed in 1938 the Bankruptcy Act of 1935 required that the benefits of the farmer-debtor provision of the Act should extend to and include only a person who is primarily bona fide personally engaged in producing products of the soil, or personally engaged in dairying, raising poultry or livestock, or the principal part of whose income is derived from one or more of the foregoing operations.

Section 75, Subdivision (r) of the Bankruptcy Act of 1933 defined *farmer* as follows: "The term *farmer* means any individual who is personally bona fide engaged primarily in farming operations, or the principal part of whose income is derived from farming operations." 47 Stat. 1473.

The debtor in his petition does not state that he is personally engaged in producing products of the soil. He does not state that he is personally engaged in dairying or raising poultry or livestock, or that

he is personally engaged in any of the occupations mentioned or enumerated in Subsection (r) of Section 75 of the Act of 1935.

The debtor's petition of 1938 says:

"DEBTOR'S PETITION

For Composition or Extension Under Section 75, Act of March 3, 1933.

"To the Honorable James Alger Fee and Claud H. McColloch, Judges of the District Court of the United States for the District of Oregon, ... Division.

"The Petition of Samuel R. Bennett of Burns, in the County of Harney, District, State of Oregon, who is at present employed as a District Grazier by the Division of Grazing of the Department of Interior at Burns:

"Respectfully Represents: That he is personally bona fide engaged primarily in farming operations (or that the principal part of his income is derived from farming operations) as follows: He owns a farm of 200 acres adjacent to said City of Burns which has been operated by himself and his second mortgagee and is now being so operated for their mutual benefit."

It will be noted that the petitioner does not allege that he is personally engaged in producing products of the soil. He does not allege that he is a *farmer*. He says he is employed as a District Grazier by the Division of Grazing of the Department of the Interior. The effect of the foregoing petition is that the petitioner states that he is not personally bona fide and primarily engaged in producing products of the soil. He makes a direct statement that he is engaged in an occupation that would exclude him

from the benefits of the farmer-debtor benefits of the Bankruptcy Act.

The words "farming operations" used by the debtor in his petition are not to be found in the 1935 amendment.

In explanation of the words "farming operations" petitioner further states "he owns a farm of 200 acres adjoining the said City of Burns which has been operated by himself and his second mortgagee and is now being so operated for their mutual benefit."

A person may *operate* a farm through a tenant or lessee or hired help, without the owner being personally engaged in producing products of the soil. The debtor's petition shows that the *operation* of the farm did not involve or include any personal efforts or action on his part. He was wholly engaged in another and dissimilar occupation. He not only neglects to state in his petition that he is personally engaged in producing products of the soil, but he does state he is engaged in an occupation that excludes the possibility that he might be engaged in producing products of the soil.

The Supreme Court of the United States by Rule XXXVIII, 298 U.S. 697-702, says:

> "The several forms annexed to these General Orders shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case."

The order of the Supreme Court to observe and use Form No. 65 adopted June 1, 1936, was not complied with in this case. Instead of observing and using the form as directed, the petitioner elected to use a form that had been abrogated, and also tried to proceed in the Federal Court under a law that had not been in effect for four years.

Appellant in his Point I, page 4 of his brief says:

> "The petitions sufficiently allege that petitioner is a farmer and are substantial compliances with the requirements of the official forms."

An examination of the petition filed December 22, 1938, will show that no allegation in that petition attempts to show that petitioner is a *farmer*. The word *farmer* is not used in that petition. Subdivision (r) of Section 75 of the 1935 Act defines the word "farmer". There is not a single statement or sentence in the petition of December 22, 1938, to indicate that any attempt is made in that petition to show that the petitioner is a farmer as defined by Subsection (r) of Section 75. Neither is there any attempt in the petition to allege or show that petitioner is of the class of persons designated and described in Subsection (r) of Section 75 of the Act of 1935. It is plain as shown by the petition that the petitioner was attempting to qualify for the relief granted by the 1933 amendment. Certainly the petition as filed does not state facts to show that petitioner is entitled to the benefits of the 1935 amendment.

Appellant's Point II is as follows:

> "The record establishes that the debtor was a farmer within the meaning of Section 75 of the Bankruptcy Act."

Section 75, Subdivision (r) of the Bankruptcy Act defines a farmer to be a person who is primarily bona fide and personally engaged in producing products of the soil, or dairying, raising livestock or poultry and the other occupations mentioned in that subsection. Appellee then must contend that the record in this case *establishes* that the debtor is primarily bona fide personally engaged in producing products of the soil.

We briefly review the record as shown by the testimony of the debtor. He says he was born on a farm and lived on his father's farm until he was about 24 years of age, when he became a full-time employee in the Forestry Service. He remained in the Forestry Service for about 15 years. In 1921 and later he acquired the farm lands near Burns involved in this controversy. In 1924 he quit the Forestry Service and devoted his entire time to these ranches, running a dairy, cutting hay and running and selling livestock. He moved away from these properties in the spring of 1930, because he became involved so heavily and had so much against the land. He went to the south end of the county and tried to farm for five seasons. In 1934 all of his stock, work horses, cattle and farming implements were sold. Since 1934 he has owned no work stock

or farming implements. Since 1934 and up to the time he began working for the Division of Grazing in 1937 he ran some cattle for his daughter, put up some hay under contract and has done some farming for his daughter. That was done through hired help. He was the administrator. He began working for the Division of Grazing in 1937 and is still so working and does not expect to resign or give up his job.

Appellee argues, page 26 of his brief, that "Debtor's absence from the mortgaged lands was temporary. The mortgagee was operating them for the debtor. The mortgagee's operations were in a true sense the debtor's operations."

The debtor has now been absent from the mortgaged premises since the spring of 1930. To this time, he has been absent from the premises mentioned in his petition for eleven cropping seasons. Debtor's attorney says in his brief that this is only a temporary absence and that debtor has only ceased to farm temporarily. He does not suggest how much time should elapse to remove the temporary status.

The fact is that for eleven cropping seasons debtor by his own testimony has not personally been engaged in producing products of the soil on the 200 acres of land near Burns which he says in his petition "has been operated by himself and his second mortgagee and is now being so operated for their mutual benefit."

Appellee argues that the appellate court must look to the whole record, including the evidence, to determine whether jurisdictional facts are stated in the petition. If this is the rule, petitioner is in a more precarious condition than he would be without such a rule. Let us examine the situation. The petitioner in his petition makes statements of his "farming operations", and the operations by himself and second mortgagee. We challenge the sufficiency of such statements. The appellee then says we will determine the meaning and sufficiency of the petition by the evidence. We then consider debtor's own testimony as to the meaning of his statements in the petition and we find from the testimony of the petitioner that for a period of ten years he has had no personal part in the farming operations mentioned in his petition. He says that in his petition, saying "the 200 acres adjoining said City of Burns which has been operated by himself and his second mortgage and is now being so operated for their mutual benefit" means this—the petitioner since the spring of 1930 has had absolutely nothing to do with the farming operations on these lands. That during all times since the spring of 1930 he has had no personal or active part in what he calls in his petition "farming operations". With this explanation of the meaning of the language in the petition, the court is asked to say that the petitioner since the spring of 1930 has been and now is primarily bona fide personally engaged in producing products of the soil on the 200 acres of land adjacent to the City of Burns.

We earnestly contend that the petition of December 22, 1938, construed with or without the record in the case, clearly shows that the debtor was not entitled to the benefits of the farmer-debtor provisions of the Act of 1935. It follows, therefore, that the court was without jurisdiction.

It is further argued in debtor's brief that the Chandler Act of 1938 changed the definition of "farmer", and that now under the Chandler Act the word "farmer" means an individual personally engaged in farming or tillage of the soil.

Apparently, the Supreme Court of the United States takes the position that the Chandler Act did not amend or change the Act of 1935 defining farmer. No new form has been prepared by the Supreme Court to meet the provisions or requirements of the Chandler Act, and the form prescribed by the court for proceedings under the Act of 1935 still is used by direction of the Supreme Court.

If, however, the Chandler Act is an amendment of the Act of 1935, the petitioner in this case is in no better, and perhaps not as good, position as he would be under the 1935 Act. The 1935 Act requires that the petitioner should be personally engaged in producing products of the soil. The Chandler Act requires that the petitioner shall be personally engaged in tillage of the soil.

If tillage of the soil has a different meaning than producing products of the soil, it would seem that

the change in the law is unfavorable to the petitioner. The product of the soil produced on the lands involved in this case is wild hay. Wild hay, we believe, is a product of the soil within the meaning of the 1935 Act. If the Chandler Act has changed the 1935 Act and if the requirement now is that the petitioner must be personally engaged in tillage of the soil, the question would arise as to whether cutting and stacking wild hay is tillage of the soil. If it is not, then the petitioner could not claim to be a farmer even if for the last ten years he had personally cut and stacked all the wild hay grown on the 200 acres of land mentioned in his petition.

But it is shown from the testimony of the petitioner, that since the spring of 1930 he has had no personal part in either the tillage of the soil, or in producing products of the soil on the lands described in his petition.

If the petitioner was ever a farmer, he had ceased to be a farmer long before the enactment of the farmer-debtor Act. Certainly, at the time the petition herein was filed, the petitioner was not a farmer.

Respectfully submitted,

J. W. McCULLOCH,
HUGH L. BIGGS,
Attorneys for Appellant.